

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAMES WHITE, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

CASE NO. C05-1785JLR

ORDER

I. INTRODUCTION

This matter comes before the court on a motion for summary judgment from the United States of America (“the Government”) (Dkt. # 20). Plaintiffs James and Alice White, a married couple, have not filed any papers in opposition to the motion nor have they requested oral argument. For the reasons stated below, the court GRANTS the Government’s motion.

II. BACKGROUND

On October 24, 2005, the Whites filed suit against the Government, alleging that employees of the Veterans Administration Hospital committed medical malpractice. In particular, the Whites allege that a physician’s negligent care caused Mr. White to suffer

1 a post-operative infection, leading to the loss of vision in his left eye. Compl. ¶¶ 4.1-4.3,
2 5.1. Ms. White brings a claim for loss of consortium. Id. at ¶ 5.2.

3 During the discovery phase of litigation, the Whites' attorney become very ill, and
4 eventually passed away in October 2006. The court stayed the matter until late February
5 2007 in order to allow the Whites time to obtain new counsel (Dkt. # 18). Since the court
6 lifted the stay, no attorney has filed a notice of appearance on the Whites' behalf. In
7 addition to staying the matter, the court also amended the scheduling order, which
8 included a revised date of March 15, 2007 for disclosing expert witness testimony and a
9 dispositive motions deadline of June 13, 2007 (Dkt. # 19). The Government now moves
10 for summary judgment based on the Whites' failure to obtain expert medical testimony.
11

12 **III. DISCUSSION**

13 Summary judgment is appropriate if the evidence, when viewed in the light most
14 favorable to the non-moving party, demonstrates there is no genuine issue of material
15 fact. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Galen v.
16 County of Los Angeles, 477 F.3d 652, 658 (9th Cir. 2007). The moving party bears the
17 initial burden of showing there is no material factual dispute and he or she is entitled to
18 prevail as a matter of law. Celotex, 477 U.S. at 323. The moving party can satisfy this
19 burden in two ways: (1) by producing evidence that negates an essential element of the
20 non-moving party's case, or (2) after suitable discovery, by showing that the non-moving
21 party does not have enough evidence of an essential element to carry its burden of
22 persuasion at trial. Id. at 322-23; see also Nissan Fire & Marine Ins. Co., Ltd., v. Fritz
23 Cos., Inc., 210 F.3d 1099, 1106 (9th Cir. 2000). If the moving party meets its burden, the
24 opposing party must present evidence to support its claim or defense. Cline v. Indust.
25 Maint. Eng'g. & Contracting Co., 200 F.3d 1223, 1229 (9th Cir. 2000). For purely legal
26 questions, summary judgment is appropriate without deference to the non-moving party.
27
28

1 When the non-moving party fails to oppose a summary judgment motion, the court must
2 still apply the above standards consistent with Fed. R. Civ. P. 56. Henry v. Gill Indus.,
3 Inc., 983 F.2d 943, 949-50 (9th Cir. 1993) (holding that court may not grant summary
4 judgment merely because motion is unopposed, even where local rules are to the
5 contrary).

6
7 In order to prevail on a medical malpractice claim in Washington, the plaintiff
8 must prove, *inter alia*, that the health care provider “failed to exercise that degree of care,
9 skill, and learning expected of a reasonably prudent health care provider at that time . . .
10 acting in the same or similar circumstances.” RCW § 7.70.040(1).¹ Washington courts
11 require expert testimony on the issue of standard of care because it is not ordinarily
12 observable from the standpoint of a layperson. See Harris v. Groth, 663 P.2d 113, 119
13 (Wash. 1983). Rare exceptions to this rule exist where a layperson is capable of balancing
14 the costs and benefits of conducting a particular procedure, id. at 119 n.6, or the
15 negligence is observable to a person without medical training, for example, where the
16 health care provider amputates the wrong limb, Young v. Key Pharm., Inc., 770 P.2d 192,
17 189-90 (Wash. 1989).

18
19 Here, the Government has retained an expert who will testify that the treatment
20 provided in conjunction with Mr. White’s eye operation conformed to the applicable
21 standard of care. See Gugin Decl. at 10. The Whites have not provided any evidence to
22 the contrary, and nothing in their Complaint indicates that an exception to the rule
23 requiring expert testimony applies in this case. See Young, 770 P.2d at 189 (“[T]he cases
24 uniformly hold that a physician’s testimony is necessary in [medical malpractice] cases to
25 defeat a defendant’s motion for summary judgment.”). Because the Whites have failed to
26

27
28 ¹Although the Whites bring their tort claim against the Government pursuant to the
Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.*, the court applies the substantive law of
Washington in evaluating their claim. See 28 U.S.C. § 1346(b).

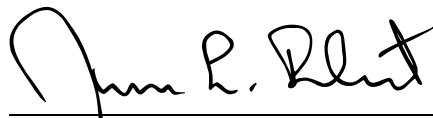
1 come forth with any competent medical testimony to create a genuine issue of material
2 fact on the issue of standard of care, the court grants the Government's motion for
3 summary judgment on Mr. White's medical malpractice claim. See Celotex, 477 U.S. at
4 322 ("[A] complete failure of proof concerning an essential element of the nonmoving
5 party's case necessarily renders all other facts immaterial.").

6
7 Lastly, Defendants contend that Ms. White's loss of consortium claim must fail
8 because it is derivative of the malpractice claim. Although the court disagrees that a loss
9 of consortium claim is "derivative" of any other cause of action, an element of Ms.
10 White's consortium cause of action is a tort committed against Mr. White. See Reichelt
11 v. Johns-Manville Corp., 733 P.2d 530, 538 (Wash. 1987). Because the court concludes
12 that there is no genuine issue of material fact with respect to the malpractice claim, Ms.
13 White's consortium claim necessarily fails.

14 IV. CONCLUSION

15
16 For the reasons stated above, the court GRANTS the Government's motion for
17 summary judgment (Dkt. # 20) and directs the clerk to enter judgment consistent with this
18 order.

19 Dated this 27th day of July, 2007.

20
21
22 
23 JAMES L. ROBART
United States District Judge
24
25
26
27
28